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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 68

WILLIAM HELIS, *Petitioner,*

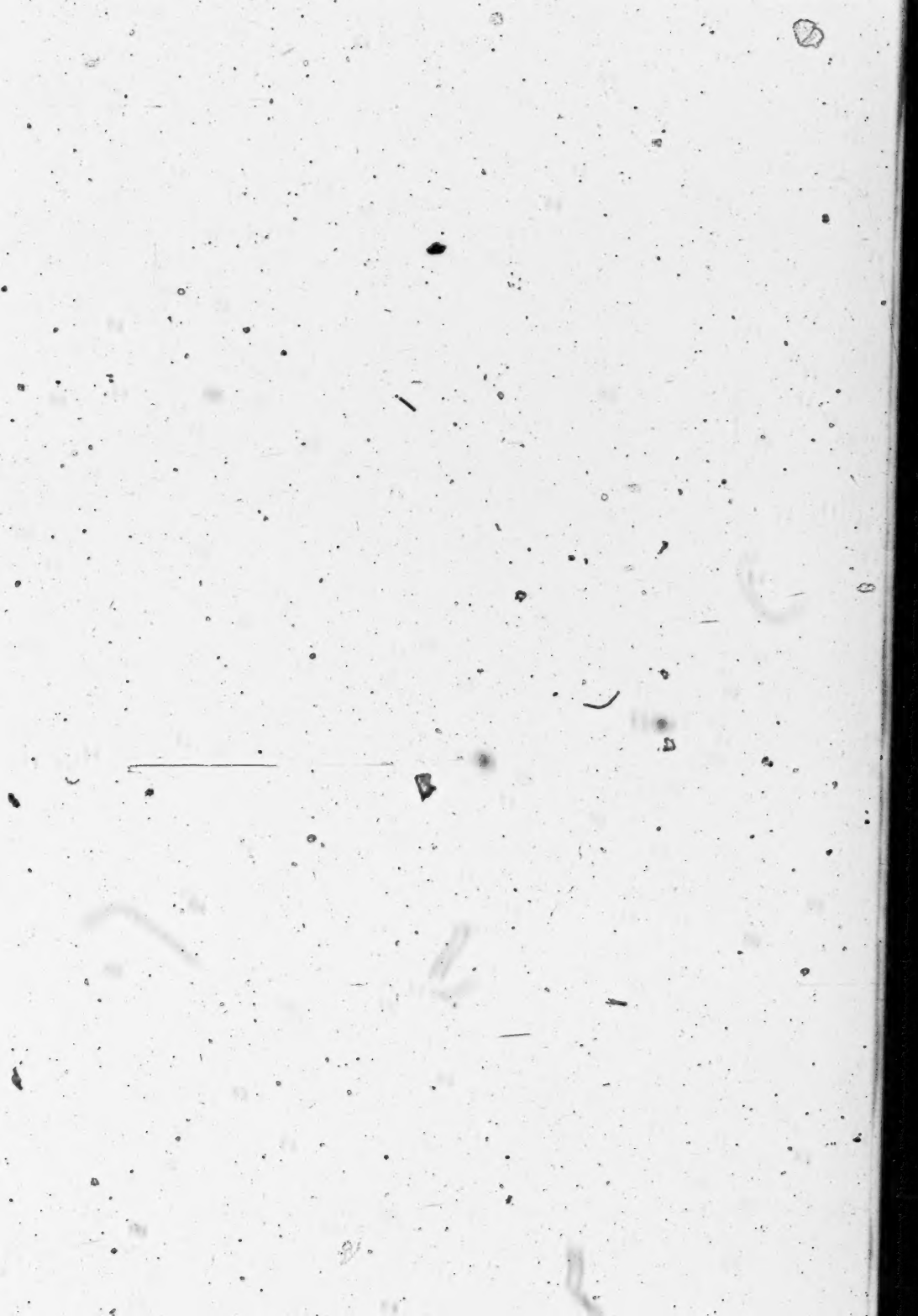
v.

MRS. ITASCA KINNEY WARD, *as Executrix of the Estate
of Bryan Ward, deceased, et al., Respondents*

**Brief of Respondents in Opposition to Petition for
Writ of Certiorari**

W. D. GORDON,
Beaumont, Texas.
Of Counsel

WM. N. BONNER,
Houston, Texas.
Attorney for Respondents



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1938

No. 988

WILLIAM HELIS, Petitioner,

v.

**MRS. ITASCA KINNEY WARD, as Executrix of the Estate
of Bryan Ward, deceased, et al., Respondents**

**Brief of Respondents in Opposition to Petition for
Writ of Certiorari**

MAY IT PLEASE THE COURT:

I.

Statement of the Case

The only question involved in this case is the proper interpretation of a simple written contract, between private individuals, for the sale of an oil and gas lease.

On February 6, 1935, Iberia Oil Corporation and respondent Y. D. Spell entered into a written option contract with

petitioner William Helis, whereby they agreed, if he exercised the option given therein, to assign to him all their rights in and under an oil and gas lease covering 60 acres of land in the Little Bayou Oil Field in Iberia Parish, Louisiana (R. 26-37); Iberia Oil Corporation thereafter was dissolved, and all of its rights under said contract passed to its stockholders, Bryan Ward and respondents A. L. Mitchell and A. B. Mhoon (R. 136-144). Bryan Ward died while this suit was pending in the court below, and respondent Mrs. Itasca Kinney Ward, his widow and executrix, was substituted as a party (R. 83, 85). Hereinafter, respondents will be referred to as though they were the original parties to said contract. At the time the option contract was made respondents had drilled on the tract one producing oil well (called the Bernard No. 1) and were then engaged in drilling a second well (called the Bernard No. 2), which they agreed to drill to completion. As consideration for the option to purchase petitioner obligated himself to commence the drilling of a third well (called the Bernard No. 3) within 15 days from the date of the contract and at his own expense to drill the well to completion (R. 27). Paragraph 3 of the contract provided that if petitioner elected to purchase the lease, the purchase price should be determined as follows (R. 28):

"(a) In the event the Bernard No. 2 well or the Bernard well No. 3 well should be brought in as producers the purchase price of the leasehold interest shall be \$300,000.00 if the average daily production of said wells for a period of fifteen days after completion is less than 3000 barrels each, calculated on a 3/8-inch choke according to the methods usually employed in gauging the capacity of the oil wells.

"(b) In the event either the Bernard No. 2 or the Bernard No. 3 well should be brought in capable of production [producing] more than 3000 barrels per day, calculated as above set forth, then the purchase price shall be \$400,000.00.

"The purchase prices above set forth shall be paid, fifty per cent in cash as provided herein, and fifty per cent out of $\frac{1}{4}$ th of $\frac{7}{8}$ ths of the proceeds derived from the production from all wells drilled and hereafter drilled on the said property."

By a paragraph incorporated into the contract as a signed addendum thereto the parties stated (R. 37):

"It is agreed by the undersigned that the test provided for in paragraph 3 of the agreement between them of even date shall be made jointly by one representative of Iberia Oil Corporation and Y. D. Spell and a representative of Wm. H  lis; and in the event they fail to agree on the proper gauge on the well or wells, Judge Harden of the firm of Pujo, Harden & Bell, will appoint a reputable engineer to act as umpire."

Petitioner agreed to exercise his option to purchase within two days after the expiration of the 15-day test period provided in paragraph 3 (R. 29), and in that event he agreed to pay to respondents as additional consideration the cost of completing the Bernard No. 2 well whether it was a producer or not. It was agreed that upon exercise by petitioner of the option, respondents would execute to him an assignment of the lease on the form attached to the contract and deliver the assignment to the National Bank of Commerce in New Orleans (hereinafter called "the bank") for his attention; and petitioner agreed to accept the assignment and pay "the proper cash portion of the purchase price" within three days after he "shall have been notified in writing of the delivery of said assignment to the said bank" (R. 29-30). It was further agreed that if respondents failed to deliver the assignment, petitioner should have the right to deposit in the bank "the applicable cash portion of the purchase price and the instruments thereafter shall stand in lieu of the aforesaid assignment," and petitioner "shall thereafter own and

hold possession in the leasehold estate in the same manner as if the said assignment had been executed" (R. 30).

The Bernard No. 2 well was dry (R. 96, 110), and the Bernard No. 3 was completed as a producer on April 21, 1935 (R. 110).

By letter dated April 24, 1935, respondents notified petitioner that in their opinion, which was shared by several experienced oil men with whom the matter had been discussed, the Bernard No. 3 well was capable of producing much in excess of 3000 barrels per day; but if petitioner was not satisfied of that fact, respondents were ready to appoint a representative to make a test as provided by the option contract (R. 144-145).

After an exchange of telegrams between the parties on April 25, 1935 (R. 146-147, 177-178), it became evident that a test would have to be made; and on April 26th (R. 148, 178-179), respondents designated E. O. Buck as their representative to make a test and the parties agreed to have the test made on the following day (R. 148). Buck went to the lease next day to make the test, but Smith and Brashear, petitioner's representatives, refused to cooperate actively; and Buck then made tests alone and reported that the well was capable of producing in excess of 6000 barrels per day (R. 149-150, 204-208), but would not produce 3000 barrels per day *through* a $3/8$ -inch choke. The parties still being unable to agree, Judge C. F. Harden, as provided by the addendum to said contract (R. 37), appointed W. L. Massey to act as umpire in making a new test (R. 153-154, 180); but petitioner, though first agreeing to the appointment (P. 152-153), later objected (R. 181-195). Nevertheless, Massey made the test on May 4th in conjunction with Buck, respondents' representative, and one Smith, representing petitioner; and he found that while the well would not produce 3000 barrels per day *through* a $3/8$ -inch choke it was capable of producing "much in excess of 3000 barrels per day on an

open flow, or through any choke larger than a $5/8$ " choke" (R. 208-214). Buck concurred in Massey's findings and conclusions and adopted Massey's report of the test as his own (R. 210).

This was issue joined in the controversy which precipitated this lawsuit. Both parties conceded that the Bernard No. 3 well was incapable of producing 3000 barrels per day *through* a $3/8$ -inch choke, but that it was "capable of producing more than 3000 barrels per day" on open flow. Respondents contended that since the well was "capable of producing more than 3000 barrels per day" on open flow, calculated on a $3/8$ -inch choke, the purchase price for the lease was \$400,000 under a proper interpretation of the contract. On the other hand petitioner contended that the purchase price was not to be \$400,000 unless the well could produce more than 3000 barrels per day *through* a $3/8$ -inch choke, and since all parties conceded that the well was incapable of such production, the proper purchase price was \$300,000. The basis of the disagreement between the parties was one of interpretation of the option contract; *whether, under the terms of the contract, productive capacity of the well was to be measured (1) by the amount of oil per day it could produce "through" a $3/8$ -inch choke or (2) by the amount of oil it could produce on open flow "calculated on a $3/8$ -inch choke."*

The Trial Judge thought that under the terms of the contract, the productive capacity of the well should be measured *by the amount of oil per day it could produce "through" a $3/8$ -inch choke* (R. 85-93), and rendered judgment accordingly (R. 94). The Circuit Court of Appeals, disagreeing with the Trial Judge, held that under the terms of the contract the productive capacity of the well should be measured *by the amount of oil it could produce on open flow "calculated on a $3/8$ -inch choke"* (R. 228-235). The Circuit Court of Appeals accordingly reversed the judgment of the District

Court and remanded the cause with directions to enter judgment for respondents for \$100,000.00 with legal interest (R. 238, 243).

II.

ARGUMENT

Summary of the Argument

POINT A. Petitioner was not misled by any ruling of the trial judge in excluding evidence, and there is no just cause for remand of the case to the District Court, because the evidence upon which the Circuit Court of Appeals found that the Bernard No. 3 well was capable of producing more than 3000 barrels of oil per day was admitted without objection, was alleged by petitioner in his own pleading, and petitioner did not contend in the Circuit Court of Appeals, either in his brief or in his petition for rehearing or his brief in support thereof, that said well was not capable of producing more than 3000 barrels of oil per day or that such fact was not in issue at the trial in the District Court or that he was misled by any ruling of the Trial Judge in excluding evidence with reference thereto.

POINT B. Petitioner has failed to show any ground for certiorari either under Sec. 240(a) of the JUDICIAL CODE as amended by the Act of February 13, 1925 [U.S.C.A., Title 28, Sec. 347(a)] or under SUPREME COURT RULE 38(5).

Point A

Petitioner concedes in his petition (p. 4) that the finding of the Circuit Court of Appeals, that the Bernard No. 3 well would make more than 3000 barrels of oil per day on open flow, is supported by the opinions and reports of Buck and Massey, the two petroleum engineers who conducted the tests to determine the open flow capacity by calculations

based upon actual production *through* a 3/8-inch choke. The evidence offered by respondents and excluded by the Trial Judge was merely cumulative of the facts contained in the reports. The report of Buck, admitted without objection (R. 149-150) contained this significant statement (R. 150):

"These results show that I am entirely certain of the conclusion that the well will actually produce far in excess of 3000 barrels per day on any choke through which it is permitted to flow as large as a 5/8-inch choke, and my conclusion is that by permitting the well to flow openly without restraint, it would produce in excess of 6000 barrels per day."

The report of Massey was to the same effect, *and petitioner so alleged* (R. 8) and attached a copy of Massey's report to his original petition (R. 8). The statements by petitioner in his petition (pp. 2, 3, 4) and supporting brief (pp. 10, 11), that he was misled by the ruling of the Trial Court in excluding the evidence offered by respondents, is without support in the record. On the other hand, petitioner heretofore has considered the reports of Buck and Massey as properly in evidence; and the evidence offered by respondents and excluded by the trial judge was merely cumulative of the facts shown by such reports. On page 5 of his original brief in the Circuit Court of Appeals petitioner said:

"Massey, in company with Buck, conducted a test and on May 6, 1935 reported that observations on chokes varying in size from 1/4-inch to 5/8-inch caused him to conclude that the well was capable of flowing merchantable oil at a rate much in excess of 3000 barrels of oil per day on an open flow or through any choke larger than a 5/8-inch choke (Tr. pages 208-214). * * * The report of Mr. Massey was concurred in by Mr. Buck (Tr. page 210)."

In his brief in support of his petition for rehearing petitioner said (page 4):

"All that Mr. Massey said (p. 209) was 'I find that said Bernard #3 well is capable of flowing merchantable oil at a rate much in excess of 3000 barrels of oil per day on an open flow, or through any choke larger than a 5/8" choke.' Mr. Buck said (p. 205): 'The results of the tests are very conclusive that the well is capable of producing considerably more than 3000 barrels per day and my calculations show that this rate of flow could be obtained on approximately a 5/8" choke.'"

It appears, therefore, that until he filed his petition for certiorari, petitioner regarded the reports of Buck and Massey as properly in evidence and apparently conceded that the Bernard No. 3 well would produce in excess of 3000 barrels of oil per day on open flow. Indeed, he himself attached a copy of Massey's report to his original petition (R. 8). Never at any time in the Circuit Court of Appeals did he complain that said well was not capable of producing more than 3000 barrels of oil per day on open flow or that such fact was not in issue and established by the evidence at the trial in the District Court. In view of such facts the complaint now made by him, for the first time, in his petition for a writ of certiorari seems, at least, insubstantial.

This Honorable Court has frequently declared that it will refused to consider errors not assigned in the Circuit Court of Appeals. *HUSTY v. UNITED STATES*, 282 U.S. 694, 61 S.Ct. 240, 75 L.Ed. 629; *DUIGNAN v. UNITED STATES*, 274 U.S. 195, 47 S.Ct. 566, 71 L.Ed. 996; *PIERCE v. UNITED STATES*, 255 U.S. 398, 41 S.Ct. 205, 65 L.Ed. 697. In *McLOUGHLIN v. RAPHAEL TUCK & SONS CO.*, 191 U.S. 267, 24 S.Ct. 105, 48 L.Ed. 178, the Court held that the error, if any, committed by a trial court in the admission of evidence is not reviewable

by writ of certiorari to a Circuit Court of Appeals where no error concerning the admission or rejection of evidence was assigned in the Circuit Court of Appeals and that Court had considered the case upon the assumption that the correctness of the rulings of the trial court in the admission of evidence was unchallenged. The principle of that decision, applied here, demonstrates that petitioner has failed to point out any substantial error authorizing the issuance of a writ of certiorari.

Point B

The only point determined by the Circuit Court of Appeals was the meaning of the phrase "calculated on a 3/8 inch choke" as used by the parties to the contract involved in this controversy. The intention of the parties as evidenced by the contract itself, the facts and circumstances surrounding its execution, and their acts and conduct subsequent thereto is not a question of gravity or importance to persons other than the parties to this suit. It is merely a question of interpretation of one particular contract between private individuals and presents no matter of such "peculiar gravity and general importance" as to warrant review by certiorari. This Honorable Court has frequently said that its jurisdiction to review the judgments and decrees of the Circuit Court of Appeals by certiorari under Sec. 240(a) of the JUDICIAL CODE is to be "exercised sparingly and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *HAMILTON-BROWN SHOE CO. v. WOLF BROS. & Co.*, 240 U.S. 251, 36 S.Ct. 269, 60 L.Ed. 629; *HOUSTON OIL CO. v. GOODRICH*, 245 U.S. 440, 38 S.Ct. 140, 62 L.Ed. 385; *FORSYTH v. HAMMOND*, 166 U.S. 506, 17 S.Ct. 665, 41 L.Ed. 1095. Furthermore, SUPREME COURT RULE 38(5) declares that "certiorari will be granted only where there are special and important reasons therefor;" and in paragraph (b) is indicated the character of reasons

which will be considered. The reasons urged here by petitioner do not appear to be of that character.

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this Court and that the petition for a writ of certiorari should be denied.

WM. N. BONNER,
Houston, Texas.

Attorney for Respondents

W. D. GORDON,
Beaumont, Texas.
Of Counsel

Dated June 15, 1939.

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